

**IN THE UNITED STATES OF AMERICA  
BEFORE THE UNITED STATES COURT OF APPEALS FOR THE  
DISTRICT OF COLUMBIA CIRCUIT**

**AMPERSAND PUBLISHING, LLC, D/B/A  
SANTA BARBARA NEWS-PRESS**

**PETITIONER,**

**V.**

**NATIONAL LABOR RELATIONS BOARD**

RESPONDENT

AND

**GRAPHICS COMMUNICATIONS CONFERENCE  
INTERNATIONAL BROTHERHOOD OF TEAMSTERS**

**INTERVENOR**<sup>1</sup>

**CASE No. 15-1074**

## STATEMENT OF ISSUES TO BE RAISED

COMES NOW, the Petitioner, Ampersand Publishing, LLC, d/b/a *Santa Barbara News-Press* (“*Santa Barbara News-Press*”) pursuant to the March 31, 2015, order of this court with this Statement of Issues to be Raised in the above-named and numbered action.

<sup>1</sup> Motion to Intervene pending.

## **I. BACKGROUND**

### **A. THE BOARD ORDER**

This Petition seeks review of the March 17, 2015, Decision and Order of the National Labor Relations Board (“NLRB” or “the Board”), finding violations of the National Labor Relations Act (“the Act”), catalogued at 362 NLRB No. 26, ordering *Santa Barbara News-Press* to cease and desist from:

1. Issuing letters or other communications to employees from the owner and copublisher offering to provide its attorney to represent employees who are contacted by Board agents investigating unfair labor practice allegations;
2. Instructing employees that anything said at an employee meeting concerning employees’ terms and conditions of employment is confidential and proprietary, and cannot be discussed by employees outside the meeting;
3. Transferring work from the bargaining unit to nonunit employees of contract agencies because unit employees formed, joined, or assisted Graphic Communications Conference, International Brotherhood of Teamsters (the Union) or any other labor organization and engaged in protected concerted activities and to discourage employees from engaging in these activities;
4. Suspending or otherwise discriminating against any employee because unit employees formed, joined, or assisted the Union or any other labor organization and engaged in protected concerted activities and to discourage them from engaging in these activities;
5. Discharging or otherwise discriminating against any employee because unit employees formed, joined, or assisted the Union and engaged in protected concerted activities and to discourage them from engaging in these activities;

6. Unreasonably delaying furnishing the Union with requested information which is relevant and necessary for the Union to perform its duties as well as collective-bargaining-representative of unit employees;
7. Transferring unit work from unit employees to nonunit employees of contract agencies and failing and refusing to provide the Union notice and an opportunity to bargain over the decision to utilize the nonunit employees and the effects of the decision on unit employees;
8. Failing to grant unit employees a merit increase in December 2006 through January 2007, in recognition of work performance during 2006, without providing the Union notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects;
9. Failing to grant unit employees a merit increase in December 2007 through January 2008, in recognition of work performance during 2007, without providing the Union notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects;
10. Failing to grant unit employees a merit increase in December 2008 through January 2009, in recognition of work performance during 2008, without providing the Union notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects;
11. Unilaterally changing the timing of employee meetings with their supervisors as part of the performance evaluation system around November 2008 without providing the Union notice and an opportunity to bargain about the change and its effects;
12. Laying off, suspending, or discharging employees without providing the Union notice and an opportunity to bargain concerning these decisions and their effects;
13. Unilaterally announcing a requirement that unit employees produce at least one story per day without providing the Union notice and an opportunity to bargain about the new policy and its effects;

14. Bypassing the Union and dealing directly with unit employees by offering employee Richard Mineards nonunit terms and conditions of employment;
15. Bargaining in bad faith with the Union by insisting, as a condition of reaching agreement on a collective-bargaining contract, that the Respondent retain unilateral control over many terms and conditions of employment, thereby leaving employees and the Union with substantially fewer rights and protections than they would have without any contract;
16. Assigning bargaining unit work to freelance non-employee Robert Eringer without providing the Union notice and an opportunity to bargain about the work assignment decision and its effects;
17. In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

and ordering *Santa Barbara News-Press* to take the following affirmative action:

1. On request, bargain in good faith with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

All full-time and regular part-time employees in the news department, including writers, reporters, copy editors, photographers, and graphic artists employed at the Respondent's Anacapa Street facility located in Santa Barbara, California, but excluding all other employees, guards, confidential employees, supervisors as defined in the Act, as amended, and writers and editors engaged primarily in working on the opinion editorial pages.

The certification year shall extend 1 year from the date that good-faith bargaining begins.

2. Reimburse the Union for its costs and expenses incurred in collective bargaining from November 13, 2007, until the date on which the last negotiation session occurred;
3. Make unit employees whole for any losses they may have suffered as a result of the discontinuation of the program of merit pay for the performance years 2006-2008 and the change in the timing of employee-supervisor performance evaluation meetings, with interest, in the manner set forth in the remedy section of this decision, as amended;
4. Make unit employees whole for any loss of earnings or other benefits suffered as a result of the unlawful unilateral use of the nonunit employees of contract agencies or other nonemployees, with interest, in the manner set forth in the remedy section of this decision, as amended;
5. On request by the Union, and to the extent sought by the Union, rescind the one-story-per-day productivity standard and the unlawful unilateral transfer of unit work to nonunit freelance employees and and nonunit employees of contract agencies;
6. Within 14 days from the date of this order, offer Dennis Moran and Richard Mineards full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed;
7. Make Dennis Moran and Richard Mineards whole for any loss of earnings and other benefits suffered as a result of the unlawful employment actions against them, with interest, in the manner set forth in the remedy section of the decision, as amended;
8. Within 14 days from the date of this Order, remove from its files any reference to the unlawful employment actions against Dennis Moran and Richard Mineards and, with 3 days thereafter, notify them in

writing that this has been done and that the wrongful employment actions will not be used against them in any way;

9. Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records including an electronic copy of such records if stored on electronic form, necessary to analyze the amount of backpay due under the terms of this Order;
10. Within 14 days after service by the Region, post at its facility in Santa Barbara, California, copies of the attached notice marked “Appendix.”<sup>2</sup> Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at the closed facility at any time since July 9, 2007;
11. Within 14 days after service by the Region file with the Regional Director for Region 31 a sworn certificate of a responsible official on

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<sup>2</sup> If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading “Posted By Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.” (Footnote in original order).

a form provided by the Region attesting to the steps that the Respondent has taken to comply.

## **II. ISSUES TO BE RAISED ON APPEAL**

*Santa Barbara News-Press* contests each and every violation of the Act contained in the Decision, each and every remedy contained in the Decision, each and every cease and desist aspect of the Order, and each and every affirmative action provision of the Order. *Santa Barbara News-Press* seeks an order from this Court granting its Petition for Review. To that end, *Santa Barbara News-Press* submits that the following issues should be reviewed in its Petition:

1. Whether the Board's Decision and Order found at 362 NLRB No. 26 (March 17, 2015) was based on substantial evidence in the record, when taken as a whole?
  - a. Whether the Board erred in finding that *Santa Barbara News-Press* violated<sup>3</sup> Section 8(a)(1) of the Act by: "issuing a letter to employees from the owner and publisher offering to provide its own attorney to represent employees who are contacted by the Board;" and "instructing employees that anything that might be said at an employee meeting including statements concerning employees [sic] terms and conditions of employment or other statements about their working conditions were confidential, proprietary, and could not be discussed by employees outside the meeting ..."
  - b. Whether the Board erred in finding that *Santa Barbara News-Press* violated Sections 8(a)(1) and 8(a)(3) of the Act by:

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<sup>3</sup> The Board specifically passed "on the Judge's finding that the memorandum was also unlawful because it discouraged employees from cooperating with Board investigations."

- i. Transferring work from the bargaining unit to agency employees who were not employees of *Santa Barbara News-Press*;
  - ii. Transferring unit work to non-employee Robert Eringer;
  - iii. On or about August 23, 2008, suspending employee Dennis Moran;
  - iv. On our about August 30, 2008, discharging employee Dennis Moran.
- c. Whether the Board erred in finding that *Santa Barbara News-Press* violated Sections 8(a)(1) and 8(a)(5) of the Act by:
  - i. Unreasonably delaying furnishing [GCC/IBT] with requested information which is relevant and necessary for [GCC/IBT] to perform its duties as the collective bargaining representative of unit employees;
  - ii. Transferring unit work from unit employees to nonunit employees of contract agencies and failing and refusing to provide [GCC/IBT] notice and an opportunity to bargain over the decision to utilize the nonunit employees and the effects of the decision on unit employees;
  - iii. Failing to grant unit employees a merit increase in December 2006 through January 2007, in recognition of work performance during 2006, without providing [GCC/IBT] notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects;
  - iv. Failing to grant unit employees a merit increase in December 2007 through January 2008, in recognition of work performance during 2007,

without providing [GCC/IBT] notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects;

- v. Failing to grant unit employees a merit increase in December 2008 through January 2009, in recognition of work performance during 2008, without providing the Union notice and an opportunity to bargain about the decision not to grant merit increases in this period and its effects;
- vi. Unilaterally changing the timing of employee meetings with their supervisors as part of the performance evaluation system around November 2008 without providing [GCC/IBT] notice and an opportunity to bargain about the change and its effects;
- vii. Laying off, suspending, or discharging employees<sup>4</sup> without providing [GCC/IBT] notice and an opportunity to bargain concerning these decisions and their effects;
- viii. Unilaterally announcing a requirement that unit employees produce at least one story per day without providing [GCC/IBT] notice and an opportunity to bargain about the new policy and its effects;
- ix. Bypassing [GCC/IBT] and dealing directly with unit employees by offering employee Richard

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<sup>4</sup> The only employees at issue, in this allegation, were Dennis Moran (suspension and discharge) and Richard Mineards (layoffs). The NLRB order modified, without explanation, the specific finding of the ALJ and substituted this generic language, to which *Santa Barbara News-Press* objects.

Mineards nonunit terms and conditions of employment;

- x. Bargaining in bad faith with [GCC/IBT] by insisting, as a condition of reaching agreement on a collective-bargaining contract, that [*Santa Barbara News-Press*] retain unilateral control over many terms and conditions of employment, thereby leaving employees and [GCC/IBT] with substantially fewer rights and protections than they would have without any contract;
- xi. Assigning bargaining unit work to freelance non-employee Robert Eringer without providing [GCC/IBT] notice and an opportunity to bargain about the work assignment decision and its effects;
- xii. In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

as each of these conclusions, individually and collectively is contrary to the evidence and the record as a whole, and contrary to law.

- d. Whether the Board erred in rejecting *Santa Barbara News-Press*' threshold arguments that the newsroom employees' and union's bargaining proposals were not protected by the Act, involved disloyal conduct, and impermissibly interfered with *Santa Barbara News-Press*' First Amendment Right to control the content of the newspaper?
- e. Whether the Board's Decision impermissibly interferes with the First Amendment Right to control the content of its newspaper through its bargaining proposals, rejection of union proposals, and management decisions?
- f. Whether the Board erred by adopting the ALJ's finding that the Decision of "Judge William G. Kocol and Ampersand

Publishing, LLC, d/b/a *Santa Barbara News-Press*, JD (SF)-37-07, an unfair labor practice case which issued December 26, 2007 ... contained a significant amount of uncontested background information which underlay [sic] the larger picture of the controversy at issue herein?”

- g. Whether the Board erred by relying on factual findings made by a separate ALJ in a prior case to which *Santa Barbara News-Press* was a party, that was still pending before the Board at the time of the ALJ’s Decision, and which is subsequently vacated in its entirety by this Court in D.C. Cir. Case No. 11-1284 on December 18, 2012?
- h. Whether the Board erred by utilizing “the Kocol Decisions, findings of violations of the Act fully to determine the remedy herein?”
- i. Whether the Board erred by characterizing employee and union attempts to wrest editorial control from *Santa Barbara News-Press* as a “Manchurian argument?”
- j. Whether the Board erred by gratuitously defining the term “investigative reporter” and utilizing its definition to find a violation of the Act?
- k. Whether the Board erred by failing to apply the Section 10(b) statute of limitations (29 U.S.C. §160(b)) regarding the allegations concerning wage increases for years 2006, 2007, and 2008?
- l. Whether the Board erred in excusing inconsistent allegations made by the General Counsel in Paragraphs 14(a) and 14(c) of the Second Amended Consolidated Complaint, even though the paragraphs were based on the same facts?
- m. Whether the Board erred by failing to find that although the General Counsel knew of exculpatory evidence regarding the discharge of Dennis Moran and that *Santa Barbara News-Press* had relied upon a lie told to *Santa Barbara News-Press* by former employee Blake Dorfman when discharging Dennis

Moran, the General Counsel's failure to disclose these facts to *Santa Barbara News-Press* at any time constituted error, misconduct, bias, and prosecutorial abuse of process?

- n. Whether the Board erred by failing to find that a violation of the Act by the Union "did not rise to level of improper efforts by the Union to bring economic pressure to bear on *Santa Barbara News-Press* in aid of its bargaining positions ... and the isolated bargaining positions ... and [it] was of no consequence to the negotiations that had been underway since November of 2007?"
- o. Whether the Board erred in failing to find that GCC/IBT's "introduction, withdrawal, reintroduction, withdrawal, and second introduction of its 'work assignment/employee integrity' proposal was not bad-faith bargaining on the part of GCC/IBT and did not stifle progress toward an overall agreement?"
- p. Whether the Board erred in failing to find that GCC/IBT's proposals on "work assignment/employee integrity" constituted an attempt to bargain over the content of the newspaper, which, in conjunction with GCC/IBT's proposals, stymied the bargaining process?"
- q. Whether the Board erred by failing to conclude that GCC/IBT engaged in bad-faith bargaining conduct, which served as a defense to the allegations of bad-faith bargaining against *Santa Barbara News-Press*?
- r. Whether the Board erred by accepting "the arguments of the General Counsel and the Charging Party that the union's proposals which [*Santa Barbara News-Press*] took to be permissive subjects of bargaining were not for that reason evidence of bad-faith bargaining by the Union?"
- s. Whether the Board erred by finding that the Union "withdrew its work assignment/employee integrity proposal?"

- t. Whether the Board erred by arbitrarily establishing two categories of “temporary employees” to justify its decision?
- u. Whether the Board erred by failing to credit un rebutted testimony that Human Resources Director Yolanda Apodaca met with the co-publishers in late 2006 regarding the use of temporary employees?
- v. Whether the Board erred by finding, without support, that temporary employees perform the same amount of work as “unit employees on an hour-by-hour basis?”
- w. Whether the Board erred by concluding, “individuals hired by agencies performed significant amounts of work between July 2007 and early 2009?”
- x. Whether the Board erred by failing to find that GCC/IBT acknowledged and accepted *Santa Barbara News-Press*’ use of temporary employees through the stipulated election agreement, the certified bargaining unit description, the proposed recognition clause of GCC/IBT’s initial proposal attempting to exclude temporary employees from the bargaining unit, *Santa Barbara News-Press*’ handbook describing temporary employees, and the fact that two members of GCC/IBT’s bargaining committee were former temporary employees at *Santa Barbara News-Press*?
- y. Whether the Board erred by finding that unit employees lost work performed by agency-provided temporary employees and the amount “after May 2007 was substantial and resulted in significant reduction of the number of unit employees by *Santa Barbara News-Press* who were in the bargaining unit?”
- z. Whether the Board erred by relying only upon temporal proximity to find a violation of Sections 8(a)(1) and 8 (a)(3) of the Act with respects to Paragraphs 10, 24, and 25 of the twice-amended consolidated complaint?

- aa. Whether the Board erred by failing to recognize that (12) twelve employee resignations diminished the number of employees in the newsroom?
- bb. Whether the Board erred by failing to find that *Santa Barbara News-Press* used staff provided from outside agencies that were supplied at a greater cost and when the Human Resources Department was overwhelmed as business necessity, rather than in violation of the Act?
- cc. Whether the Board erred by finding that the employment classifications of Marci Wormser “was manipulated by [*Santa Barbara News-Press*] for strategic and tactical reasons having no relationship to the business needs of [*Santa Barbara News-Press*] or the workload of the Human Resources Department?
- dd. Whether the Board erred by finding that, “The General Counsel met its burden of proof by a preponderous of evidence that [*Santa Barbara News Press*]’s anti-union sentiment was a motivating factor [*Santa Barbara News-Press*]’s subtracting [sic] decision and in the implementation of that decision on and after May 2007?”
- ee. Whether the Board erred by finding that the General Counsel met its *Wright Line* burden with respect to the decision to utilize temporary employees.
- ff. Whether the Board erred in finding that temporary employees performed “a significant proportion of ... unit work,” and that “the subcontracting of the work involved a significant proportion of the bargaining unit?”
- gg. Whether the Board erred in finding that GCC/IBT’s “economic position” was weakened by *Santa Barbara News-Press* utilizing temporary workers and that *Santa Barbara News-Press*’ use of temporary workers undermined employees abilities to utilize economic force against *Santa Barbara News-Press*?
- hh. Whether the Board erred by finding *Santa Barbara News-Press* failed to meet “its burden of showing that it would have taken

the actions it did (in utilizing temporary employees) in the absence of its employees' protected activity?"

- ii. Whether the Board erred by substituting its business judgment for that of *Santa Barbara News-Press* with respect as to how to expend resources?
- jj. Whether the Board erred in finding that "there is no evidence that the economics of the process had changed from the time the earlier use of such agencies was discontinued by [*Santa Barbara News-Press*] on cost grounds over five years before?"
- kk. Whether the Board erred in finding that *Santa Barbara News-Press* did not offer any evidence "to explain why the entire process of subcontracting was reinitiated ... without notifying and bargaining with [GCC/IBT]?"
- ll. Whether the Board erred in finding that *Santa Barbara News-Press* did not argue that GCC/IBT's information requests were not necessary and that GCC/IBT was not entitled to the information "under challenge?"
- mm. Whether the Board erred in finding that only the timing between the request and providing the information at issue?
- nn. Whether the Board erred by presuming that "the relevance of the information sought was 'apparent to the employer under the circumstances'?"
- oo. Whether the Board erred in finding that GCC/IBT demonstrated the relevance of the requested information?
- pp. Whether the Board erred in finding that the information sought by GCC/IBT was relevant and necessary to a decision "to file or process grievances?"
- qq. Whether the Board erred by failing to find that "the information requested was so burdensome to gather, compile, and report that the time taken to provide it was necessary or reasonable?"

- rr. Whether the Board erred in failing to find that the time in which *Santa Barbara News-Press* responded to GCC/IBT's information requests was reasonable and did not violate the Act?
- ss. Whether the Board erred by finding that Richard Mineards worked as a "radio broadcaster in April 2007, and worked through 2008 for [*Santa Barbara News-Press*] in the bargaining unit?"
- tt. Whether the Board erred by finding that *Santa Barbara News-Press* "did not notify [GCC/IBT or offered to bargain with it respecting] Mineards' layoff?"
- uu. Whether the Board erred in finding that *Santa Barbara News-Press* had an obligation to bargain with GCC/IBT regarding the layoff and effects of Mineards' layoff?
- vv. Whether the Board erred in finding that "the negotiations between [*Santa Barbara News-Press*] and [GCC/IBT] and Mineards were pure and simply economic?"
- ww. Whether the Board erred by finding that *Santa Barbara News-Press* did not timely notify GCC/IBT of Mineards' layoff and provide it time to bargain over both the decision and effects of the layoff?
- xx. Whether the Board failed to dismiss the allegation regarding the purported direct dealing with Mineards by Supervisor Don Katich as an isolated and *de minimis* act of a new supervisor?
- yy. Whether the Board erred by concluding that it took (26) twenty-six days for *Santa Barbara News-Press* to respond to GCC/IBT's information request pertaining to Richard Mineards' layoff?
- zz. Whether the Board erred by finding that "*Santa Barbara News-Press* deliberately delayed giving [GCC/IBT] information which would disrupt [*Santa Barbara News-Press*]'s then ongoing illegal direct dealing with Mineards?"

- aaa. Whether the Board erred in finding that *Santa Barbara News-Press* was simultaneously negotiating with GCC/IBT and Mineards?
- bbb. Whether the Board erred by concluding “It is likely that other agents of [*Santa Barbara News-Press*] would have been aware of Katich’s plans and intentions regarding Mineards even if they had not given Katich his marching orders in dealing with Mineards?”
- ccc. Whether the Board erred by finding that Editor Travis Armstrong knew of *Santa Barbara News-Press*’ purported ongoing direct dealing with Mineards?
- ddd. Whether the Board erred in finding that a “26-day delay of [*Santa Barbara News-Press*] in providing [GCC/IBT] its requested information (regarding Mineards) was clearly unreasonable and violated Section 8(a)(1) and 8(a)(5) of the Act?”
- eee. Whether the Board erred in finding “There was no dispute that the August 6, 2008 [GCC/IBT] information request was made as alleged and that [*Santa Barbara News-Press*] supplied the information at the October 22, 2008 bargaining session?”
- fff. Whether the Board erred in finding “There was no dispute that the September 9, 2008 [GCC/IBT] information request was made as alleged and that [*Santa Barbara News-Press*] supplied the information by letter dated October 24, 2008 bargaining session [sic]?”
- ggg. Whether the Board erred in finding that the relevance of the information requested by GCC/IBT “was known to [*Santa Barbara News-Press*] or at the very least should have been apparent to [*Santa Barbara News-Press*] under all the circumstances?”

- hhh. Whether the Board erred in concluding that the information requested by GCC/IBT was relevant?
- iii. Whether the Board erred in rejecting *Santa Barbara News-Press*' argument that a "standing" information request is invalid and not sanctioned by the Act?
- jjj. Whether the Board erred by relying upon "the entire history of the relationship, the bargaining, and the other information requests and [*Santa Barbara News-Press*]'s responses to them" to determine that *Santa Barbara News-Press*' responses were "unreasonably delayed?"
- kkk. Whether the Board erred by find that *Santa Barbara News-Press* "could and should have ... conveyed to [GCC/IBT] well before the actual times of delivery" the requested information?
- lll. Whether the Board erred in finding that *Santa Barbara News-Press* contacted Richard Mineards within a week of "proposing [Mineards'] resume as column for [*Santa Barbara News-Press*]?"
- mmm. Whether the Board erred by finding that *Santa Barbara News-Press* had an obligation to bargain over the decision to layoff Mineards and failed to find that Mineards layoff was a change in the scope and direction of the enterprise?
- nnn. Whether the Board erred by concluding that *Santa Barbara News-Press* had an obligation to bargain over the effects of the decision to layoff Mineards?
- ooo. Whether the Board erred in finding that *Santa Barbara News-Press* "was prepared to continue Minards' column duties at a reduced compensation and with additional duties added on?"
- ppp. Whether the Board erred in finding that *Santa Barbara News-Press* contracted with freelancer Robert Eringer "to

provide copy for publication in the Paper of an investigatory reporter column?”

qqq. Whether the Board erred in finding that “There is no real dispute ... that the work done by Eringer for [*Santa Barbara News-Press*] was bargaining unit work?”

rrr. Whether the Board erred by failing to recognize that no bargaining unit employee had the abilities of Robert Eringer with respect to news story sources, experience, and reputation?

sss. Whether the Board erred in failing to recognize that *Santa Barbara News-Press* had previously engaged freelancers as a past practice?

ttt. Whether the Board erred by infringing upon *Santa Barbara News-Press*’ right to control the content of its newspaper in finding violations of the Act with respect to contracting for and publishing columns written by Robert Eringer?

uuu. Whether the Board erred by finding that *Santa Barbara News-Press* had an obligation to bargain over the content of the newspaper by finding a violation of the Act with respect to Robert Eringer’s columns?

vvv. Whether the Board erred by failing to recognize an employee (who had been a stalking victim) complaining of unsolicited contact by the NLRB on her personal telephone as “harassment?”

www. Whether the Board erred by concluding that *Santa Barbara News-Press* “went out of its way in its communication to employees to hold back facts it knew, expressed hostility to the government and its agents and associated them with partisan misconduct in investigations,” and relied upon these contested facts to find a violation of the Act?

xxx. Whether the Board erred in finding that *Santa Barbara News-Press* had attorneys that would represent employees during the Board’s ongoing investigation and suggested that

employees be represented by *Santa Barbara News-Press*' attorneys in violation of the Act?

yyy. Whether the Board erred in finding that the August 22, 2008 memorandum had a likely impact on employees, contained additional warnings and admissions respecting NLRB conduct, and these contested facts supported a violation of the Act?

zzz. Whether the Board erred in finding that *Santa Barbara News-Press* knew that the NLRB had employees' personal contact information and that the memorandum was, "not truthful, and was calculated to produce a hostile view of the NLRB, by creating a false impression that the NLRB was harassing [*Santa Barbara News-Press*]'s employees?"

aaaa. Whether the Board erred by failing to recognize the August 22, 2008 memorandum as an expression of *Santa Barbara News-Press*' First Amendment Rights codified in Section 8(c) of the Act (29 U.S.C. §158(c))?

bbbb. Whether the Board erred by finding *Santa Barbara News-Press* ever provided merit raises annually, rather than discretionary wage increases?

cccc. Whether the Board erred in finding that the August 22, 2008 memorandum "improperly discouraged [*Santa Barbara News-Press*] employees from cooperating with the Board's ongoing investigation" in violation of the Act?

dddd. Whether the Board erred by applying an improper standard to evaluate Don Katich's statements at a December 3, 2008 newsroom meeting?

eeee. Whether the Board erred in its gratuitous definition of a "trade secret?"

ffff. Whether the Board erred in its gratuitous definition of "proprietary information?"

gggg. Whether the Board erred by failing to recognize Don Katich's statements at a December 3, 2008, in the newsroom as protected expression under 8(c) of the Act (29 U.S.C. §158(c))

hhhh. Whether the Board erred in failing to find that *Santa Barbara News-Press* did not clarify any questions and concerns expressed by GCC/IBT regarding statements made at the December 3, 2008 meeting in the newsroom?

iiii. Whether the Board erred by failing to appreciate the explicit language of *Santa Barbara News-Press*' employee handbook addressing the very issue claimed to violate the Act in the December 3, 2008 newsroom meeting?

jjjj. Whether the Board erred in failing to find that *Santa Barbara News-Press* had established a one story per day expectation of newsroom employees prior to December 3, 2008?

kkkk. Whether the Board erred in categorizing the one story per day expectation as "new action" communicated at the December 3, 2008 meeting?

llll. Whether the Board erred in finding that *Santa Barbara News-Press* had an obligation to take action as requested by GCC/IBT and retract statements made at the December 3, 2008 meeting and/or assure employees that there was no new standard in place?

mmmm. Whether the Board erred in finding that *Santa Barbara News-Press* did not assuage any employee concerns and address any questions individual employees had about story requirements?

nnnn. Whether the Board erred in finding that employees reasonably believed that their performance requirements had been raised?

oooo. Whether the Board erred by finding that *Santa Barbara News-Press* failed to conduct performance evaluations for 2008 performance?

pppp. Whether the Board erred in finding that the “delay” in providing employees their 2008 performance reviews was a unilateral change?

qqqq. Whether the Board erred in finding that employee meetings where supervisors issued performance evaluations to employees was an interactive process where employees had “an opportunity to change supervisors’ minds about numeric scoring?”

rrrr. Whether the Board erred in finding that a delay in meeting with supervisors to discuss a performance evaluation “may easily cause the supervisor to become less likely to change the ratings and scores in a later employee meeting?”

ssss. Whether the Board erred in finding that a change in the timing of the review violated the Act?

tttt. Whether the Board erred by failing to recognize the explicit language of the Employee Handbook, which established a status quo where all compensation increases were at the sole discretion of *Santa Barbara News-Press*?

uuuu. Whether the Board erred by failing to recognize that at negotiations in November of 2007, GCC/IBT agreed that *Santa Barbara News-Press* “should continue to do what you have always done with respect to wage increases?”

vvvv. Whether the Board erred by concluding that *Santa Barbara News-Press* “coordinated the terms and conditions of unrepresented employees with represented employees as a business necessity?”

www. Whether the Board erred in failing to find that GCC/IBT knew or should have known that the lack of a wage increase for work performed in 2006 by no later than February 2007

constituted knowledge of GCC/IBT of the lack of a wage increase for work performed in 2006?

xxxx. Whether the Board erred in failing to find that bargaining unit employees were defacto agents of GCC/IBT?

yyyy. Whether the Board erred by failing to rely upon the admissions of Dawn Hobbs and Karna Hughes to conclude that union-affiliated employees were aware of a lack of a wage increase no latter than February 2006?

zzzz. Whether the Board erred by failing to rely upon the General Counsel's administrative admission in NLRB Case No. 31-CA-27950 et al. issued on May 31, 2007, to dismiss an untimely allegation?

aaaaa. Whether the Board erred by tolling the statute of limitations instead of dismissing an allegation about wage increases for work performed in 2006?

bbbbb. Whether the Board erred by failing to recognize that the employee handbook explains that annual wage increases are not guaranteed and not based exclusively upon merit?

ccccc. Whether the Board erred by tolling the statute of limitations instead of dismissing an allegation about wage increases for work performed in 2006?

dddd. Whether the Board erred by failing to recognize that the employee handbook explains that annual wage increases are not guaranteed and not based exclusively upon merit?

eeee. Whether the Board erred in describing wage increases as "annual merit-pay increases" that were awarded solely only merit from 2000-2005 and failed to recognize that wage increases were discretionary, not guaranteed, and that merit was but a factor in determining whether a discretionary usage increase occurred?

- fffff. Whether the Board erred in finding that *Santa Barbara News-Press* did not notify and bargain with GCC/IBT with respect to the lack of a wage increase for performance years 2006, 2007, and 2008?
- ggggg. Whether the Board erred in finding that *Santa Barbara News-Press* unilaterally determined not to grant “merit raises” at the end of the 2006 performance year?
- hhhhh. Whether the Board erred by finding that *Santa Barbara News-Press* violated the Act with respect to the lack of wage increases for work performed in 2006, 2007, and 2008?
- iiii. Whether the Board erred by failing to credit and consider the testimony of newspaper expert John Morton about newspaper trends, declining circulation, comparative lack of advertising revenue, declining readership, and the overall health of the newspaper industry?
- jjjjj. Whether the Board erred by failing to find that *Santa Barbara News-Press* had a legitimate, non-discriminatory business reason to not grant annual raises for work performed in 2006, 2007, and/or 2008?
- kkkkk. Whether the Board erred by crediting the testimony of former employee Blake Dorfman?
- lllll. Whether the Board erred by finding that *Santa Barbara News-Press* assigned Blake Dorfman and John Dvorak editor duties?
- mmmmm. Whether the Board erred in finding that Dennis Moran did not speak with Richard Chavez?
- nnnnn. Whether the Board erred by crediting the testimony of Dennis Moran and not that of Scott Steepelon regarding Moran having spoken to Richard Chavez about the Santa Barbara Golf Classic in 2008?

ooooo. Whether the Board erred by failing to credit the testimony of Scott Steepleton regarding the August 23, 2008 meeting with Dennis Moran?

ppppp. Whether the Board erred by categorizing Dennis Bateman as “an ally” in conjuring the notion that *Santa Barbara News-Press* targeted Dennis Moran instead of Dennis Bateman?

qqqqq. Whether the Board erred by failing to credit the email sent to co-publisher Arthur von Wiesenberger naming Dennis Moran as the individual who had spoken to Richard Chavez as not credible?

rrrrr. Whether the Board erred by failing to conclude that Dennis Moran acknowledged that he had spoken to Richard Chavez about the Santa Barbara Golf Classic in 2008?

sssss. Whether the Board erred in finding “The logical force of this conclusion that Moran was the villainous ‘Dennis’ based on his union activities, is sustained primarily by the lack of record alternatives?”

ttttt. Whether the Board erred in finding that *Santa Barbara News-Press* took action against Moran due to his purported union activities?

uuuuu. Whether the Board erred by conjuring the notion that *Santa Barbara News-Press’* actions with respect to the discipline of Dennis Moran was a scheme to target Moran because of his purported union activities?

vvvvv. Whether the Board erred by concluding that the General Counsel sustained his *Wright Line* burden that *Santa Barbara News-Press* suspended Dennis Moran because of his union activities and sympathies?

wwwww. Whether the Board erred in finding “There is no credible basis on this record for finding that [*Santa Barbara News-Press*] has any other reason – other than Moran’s union

activities and sympathies – for assuming Dennis Moran rather than Dennis Bateman or another employee as a self identified Dennis who spoke to Richard Chavez by telephone regarding the golf tournament?”

xxxxx. Whether the Board erred by rejecting *Santa Barbara News-Press*’ arguments that it had a reasonable belief that Dennis Moran committed an offense for which he was disciplined?

yyyyy. Whether the Board erred by substituting its business judgment for that of *Santa Barbara News-Press* regarding the discipline of Dennis Moran?

zzzzz. Whether the Board erred by concluding that *Santa Barbara News-Press* would not have suspended Moran if he had not engaged in purported union activities, and that the General Counsel met this burden of proof?

aaaaaa. Whether the Board erred by characterizing Blake Dorfman’s statement to *Santa Barbara News-Press* that Dennis Moran cleaned out Blake Dorfman’s desk upon Dorfman’s resignation as “a casual statement?”

bbbbbb. Whether the Board erred by utilizing an *ex post facto* conclusion that Blake Dorfman lied to *Santa Barbara News-Press* about his intention to resign from *Santa Barbara News-Press* prior to his trip to China to cover the 2008 Olympics?

cccccc. Whether the Board erred by comparing Moran’s discharge as something from a Franz Kafka novel?

dddddd. Whether the Board erred by failing to find that Dennis Moran informed *Santa Barbara News-Press* that he would contact *Santa Barbara News-Press* if he thought of anything else subsequent to his termination, and that Moran did not contact *Santa Barbara News-Press* to inform *Santa Barbara News-Press* Blake Dorfman had lied to *Santa Barbara News-Press* about Moran cleaning out Dorfman’s desk?

eeeeee. Whether the Board erred by finding that *Santa Barbara News-Press* “blindly believed” Blake Dorfman’s statement about Dennis Moran cleaning out Dorfman’s desk?

ffffff. Whether the Board erred in gratuitously stating that *Santa Barbara News-Press* did not attempt to verify Dorfman’s statements and that if *Santa Barbara News-Press* had it “would have been quickly discerned, if not immediately corrected by Dorfman himself or Moran?”

gggggg. Whether the Board erred by concluding that the General Counsel sustained the complaint allegations that *Santa Barbara News-Press* violated the Act through its discharge of Moran?

hhhhhh. Whether the Board erred in finding that *Santa Barbara News-Press* had an obligation to bargain with GCC/IBT regarding “the suspension process and the discipline that could potentially result” regarding Moran’s suspension?

iiiiii. Whether the Board erred in finding that *Santa Barbara News-Press*’ refusal to bargain over Moran’s suspension and discipline violated the Act?

jjjjjj. Whether the Board erred in finding that “The same decisional law applied to Moran’s suspension applies to Moran’s discharge ... and [*Santa Barbara News-Press*]’s obligation to bargain preceded its discharge decision?”

kkkkkk. Whether the Board erred in finding that *Santa Barbara News-Press* “had an obligation to meet and bargain with GCC/IBT before the decision to discharge was made and an obligation to bargain over the effects of the discharge?”

llllll. Whether the Board erred by concluding that GCC/IBT negotiator Nicholas Caruso had “many years of negotiating experience within the publishing industry?”

mmmmmm. Whether the Board erred by admitting unauthenticated “bargaining notes” of GCC/IBT that were not

contemporaneously prepared with negotiations and not uniformly taken by the same individual?

nnnnnn. Whether the Board erred by failing to find that the experience of *Santa Barbara News-Press*' chief negotiator combined with contemporaneous, detailed, comprehensive, exhaustive notes of negotiations accurately chronicled the proposals and discussions of the parties throughout their 27 meetings of negotiations?

oooooo. Whether the Board erred in categorizing the lack of footnote text to footnote 45 of the ALJ Decision as an "agreement" by the ALJ to leave the footnote blank?

pppppp. Whether the Board erred in its description of GCC/IBT's action with regard to the modification of GCC/IBT's bulletin board proposal of February 15, 2008?

qqqqqq. Whether the Board erred by suggesting that GCC/IBT negotiator Caruso took notes at negotiations and that these notes were an accurate representation of what occurred?

rrrrrr. Whether the Board erred by failing to acknowledge that GCC/IBT's proposal, withdrawal, re-proposal, withdrawal, and re-proposal of the "integrity/ethics" proposal frustrated an overall agreement by virtue of effectively eviscerating the management rights clause, discipline and discharge clause, and grievance and arbitration clause proposals of *Santa Barbara News-Press* and GCC/IBT?

ssssss. Whether the Board erred by creating an apparent new standard that "Because the party is aware the proposal is an anathema to the other side, is [sic] bad faith bargaining because there is no true intention by the offering party to reach agreement?"

ttttt. Whether the Board erred by describing a "predictably unacceptable" test in this case?

uuuuuu. Whether the Board erred by finding that *Santa Barbara News-Press*’ “consistent failure and refusal to accept binding arbitration and any limitation of [*Santa Barbara News-Press*]’s unfettered power to decide at the final step all unit employee discipline matters, including matters of measuring and judging employee performance, are predictably unacceptable to labor organizations representing employees under the Act?”

vvvvvv. Whether the Board erred by failing to accept the fact that a collective bargaining agreement signed by GCC/IBT with another employer and/or that exists in another media employer containing the same language demonstrates that the proposed language is not “predictably unacceptable?”

wwwww. Whether the Board erred by concluding that relationships in unrepresented workplaces are irrelevant to determining whether *Santa Barbara News-Press* violated the Act?

xxxxxx. Whether the Board erred in finding that *Santa Barbara News-Press* ever “insisted” on any proposal, including the management rights proposal, grievance and arbitration proposal, discipline and discharge proposal, and/or the bulletin board proposal?

yyyyyy. Whether the Board erred in finding that *Santa Barbara News-Press*’ management rights proposal “eviscerate in perpetuity” Section 8(a)(5) of the Act?

zzzzzz. Whether the Board erred in finding that the union would have “no rights whatsoever” by virtue of the proposed collective bargaining agreement?

aaaaaa. Whether the Board erred in finding that the proposals of *Santa Barbara News-Press*, if accepted by GCC/IBT would have rendered GCC/IBT and unit employees “worse off” in terms of the statutory bargaining rights the Act provides than if they had not agreed to a contract at all?

bbbbbbb. Whether the Board erred in failing to recognize that the lack of a proposed no-strike clause was a material fact that demonstrated *Santa Barbara News-Press*' bargaining conduct and proposals comported with the Act?

ccccccc. Whether the Board erred in failing to find that GCC/IBT's admission that the parties were not at impasse served as a defense to the allegations that *Santa Barbara News-Press* insisted on any proposals, much less the proposals the Board found to violate the Act?

ddddddd. Whether the Board erred in finding that *Santa Barbara News-Press* engaged in bad faith bargaining?

eeeeeee. Whether the Board erred in finding that *Santa Barbara News-Press*' proposals sought to return terms and conditions of employment to that which existed prior to GCC/IBT's certification as a representative, but at the same time would have put the employees in a worse-off position than if they had no union at all?

ffffff. Whether the Board erred in finding that *Santa Barbara News-Press* engaged in "an on-going broad and pernicious pattern of unfair labor practices designed to delay bargaining and undermine [GCC/IBT]'s strength and support among unit employees?

ggggggg. Whether the Board erred by relying upon inferences, rather than direct evidence, to support findings of bad faith bargaining?

hhhhhhh. Whether the Board erred by considering the relative bargaining strength of the parties when rendering its decision regarding bad faith bargaining?

iiiiiii. Whether the Board erred by failing to appreciate Section 8(d) of the Act (29 U.S.C. §158(d)) when conducting its analysis regarding bargaining?

jjjjjj. Whether the Board erred in failing to recognize that *Santa Barbara News-Press* had a legitimate, sincere belief for its proposals?

kkkkkk. Whether the Board erred by failing to recognize that *Santa Barbara News-Press* believed that it had the bargaining strength to achieve its bargaining goals?

llllll. Whether the Board erred by improperly attempting to influence the balance of bargaining power by tipping the scales in the favor of GCC/IBT as a result of the Decision and Order?

mmmmmm. Whether the Board erred by extending the certification year as part of the remedy?

nnnnnn. Whether the Board erred by awarding GCC/IBT bargaining expenses as part of the remedy?

2. Whether the D.C. Circuit should review the Board's findings concerning *Santa Barbara News-Press*' First Amendment rights and infringement of said rights under a *de novo* standard, as the Board is entitled to no deference on constitutional issues according to *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 574-75, 108 S.Ct. 1392, 99, L.Ed.2d 645 (1988), *Sheet Metal Workers' Int'l Assn., Local 15 v. NLRB*, 491 F.3d 429, 434 (D.C. Cir. 2009), *J.J. Cassone Bakery, Inc. v. NLRB*, 554 F.3d 1041, 1049 (D.C. Cir. 2009) and *Overstreet ex rel. NLRB v. Untd. Bhd. of Carpenters & Joiners of Am., Local 1506*, 409 F.3d 1199, 1209 (9<sup>th</sup> Cir. 2005)?
3. Whether the Board erred in failing to dismiss the Complaint?
4. Whether the Board erred in failing to address *Santa Barbara News-Press*' arguments regarding prosecutorial abuse of discretion, specifically the General Counsel's prosecution of the allegations surrounding Dennis Moran's discipline, and discharge.
5. Whether the Board's Decision and Order constituted arbitrary and capricious agency action because it conflicted with established

judicial and agency decisions, and because the Board offered no reasoned explanation of why it abandoned established precedent?

- a. Whether the Board properly ordered backpay and other monetary awards computed with interest compounded on a daily basis, as such an award went beyond the General Counsel's request, fails to make any reference to computing on a quarterly basis, fails to account for any offsetting due to interim earnings, deviates from longstanding Board practices, and is punitive, reflecting an abuse of the administrative process as the Board bypassed its obligations under the Administrative Procedures Act, 5 U.S.C. §533, thereby constituting arbitrary and capricious agency action by legislating through executive fiat?
  - b. Whether the Board properly ordered *Santa Barbara News-Press* to distribute an electronic notice (such as by e-mail, posting on an intranet or internet site, and/or other electronic means) if *Santa Barbara News-Press* customarily communicates with its employees by such means, transforming an extraordinary remedy into a routine one, as (1) electronic postings are not directly analogous to physical postings, (2) federal courts and agencies do not require use of electronic communications as a remedial matter, (3) electronic posting requirements impose additional burdens on *Santa Barbara News-Press* and its information technology personnel, and (4) electronic postings do not account for the increased risk of anonymous alteration and broad distribution to non-employees, customers, and competitors, thus acting as a punitive measure contrary to the remedial purpose of the Act?
  - c. Whether the Board properly ordered *Santa Barbara News-Press* to have the Board's notice, "publicly read by a responsible corporate management official or by a Board agent in the presence of a responsible management official" as this is an extraordinary remedy?
6. Whether the Board erred in failing to reconsider its December 27, 2012 Decision and Order by failing to recognize:

- a. The General Counsel never sought the reimbursement of bargaining expenses as a remedy, and GCC/IBT admitted, at the onset of the hearing, that it was “satisfied with the remedy” sought by the General Counsel?
  - b. GCC/IBT – not the General Counsel – sought the reimbursement of bargaining expenses as a remedy for the first time on September 23, 2011, in its Exceptions. GCC/IBT’s Exceptions were filed over one year after the Recommended Decision of the ALJ and two years after the record closed?
  - c. The General Counsel has never sought the reimbursement of bargaining expenses as a remedy?
  - d. The Board deviated from its established precedent, without explanation, and permitted GCC/IBT to expand the scope of the Complaint beyond that prosecuted by the General Counsel? *Cf. California Saw & Knife Works*, 320 NLRB 224, 275 (1995).
  - e. Without explanation, the Board Decision deviated from its *The Bakersfield Californian* Decision, 337 NLRB 296 (2001), by expanding the remedy beyond that sought by the General Counsel even after the General Counsel, at the hearing, made no effort to expand the remedy sought, even after being solicited by the ALJ?
  - f. The *sua sponte* nature of the remedy ordering the reimbursement of GCC/IBT’s bargaining expenses is unprecedented and non-remedial; the punitive nature of the remedy does not align with the Congressionally-mandated equitable relief contained in the National Labor Relations Act?
7. Whether the Board erred by modifying the remedy, in its September 27, 2012 Order Denying Motion for Reconsideration and Modifying Remedy, as the new Paragraph 2(h) constitutes an *ex post facto* remedy?
  8. Whether the Board erred in failing to find that *Santa Barbara News-Press v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012), served as dispositive

precedent for those allegations in the instant case that relied upon the vacated Board Decision.

9. Whether the Board erred in finding, in its Order Denying Motion for Reconsideration and Modifying Remedy, that *Santa Barbara News-Press* somehow waived reliance upon *Santa Barbara News-Press v. NLRB*, 702 F.3d 51 (D.C. Cir. 2012), “as support for any argument that it may ultimately make on appeal with respect to issues reviewable by an appellate court” even though the court decision issued after the time for a Motion for Reconsideration had passed, pursuant to 29 U.S.C. § 102.48(d)(1) & (2), and there is no provision in the Board’s Rules and Regulations contemplating or mandating an amendment to a Motion for Reconsideration?

DATED: April 30, 2015  
Nashville, Tennessee

Respectively submitted,

/s/ L. Michael Zinser  
L. Michael Zinser

/s/ Glenn E. Plosa  
Glenn E. Plosa

**THE ZINSER LAW FIRM, P.C.**  
414 Union Street, Suite 1200  
Nashville, Tennessee 37219  
Telephone: (615) 244-9700  
Facsimile: (615) 244-9734

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing STATEMENT OF ISSUES TO BE RAISED was filed electronically with the Court's CM/ECF system and served upon the addresses described below this 30<sup>th</sup> day of April 2015:

Linda Dreeben  
National Labor Relations Board  
1099 14<sup>th</sup> Street, N.W.  
Washington, D.C. 20570

Ira L. Gottlieb  
Bush Gottlieb Singer Lopez Kohanski Adelstein & Dickinson  
500 North Central Avenue, Suite 800  
Glendale, CA 91203

/s/ Glenn E. Plosa  
Glenn E. Plosa